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No. 91-1766

In the Supreme Court of the United States

OCTOBER TERM, 1992

CHURCH OF SCIENTOLOGY OF CALIFORNIA, PETITIONER

v.

UNITED STATES OF AMERICA AND FRANK S. ZOLIN

ON PETITION FOR A WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE NINTH CIRCUIT

BRIEF FOR THE UNITED STATES

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QUESTION PRESENTED

Whether an appeal from an order enforcing an administrative summons becomes moot when the materials sought by the summons have been produced pursuant to the order.

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OPINIONS BELOW

The order of the court of appeals (Pet. App. 1a) dismissing the appeal as moot is unreported. The order entered by the district court (Pet. App. 2a-3a) on September 4, 1991, is unreported. The prior opinion of the court of appeals (Pet. App. 4a-17a) is reported as *United States* v. *Zolin*, 809 F.2d 1411.[1] The prior order of the district court (Pet. App. 18a-20a) entered on April 30, 1985, is unreported.

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[1] The court of appeals' decision was subsequently affirmed in part and reversed in part on other issues by this Court. *United States* v. *Zolin*, 491 U.S. 554 (1989). The opinion of the court of appeals following remand from this Court is reported at 905 F.2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991).

JURISDICTION

The order of the court of appeals was entered on January 31, 1992. The petition for a writ of certiorari was filed on April 30, 1992. The jurisdiction of this Court is invoked under 28 U.S.C. 1254(1).

STATEMENT

1. In 1984, the Internal Revenue Service (IRS) commenced an investigation of the tax returns of L. Ron Hubbard, founder of petitioner (the Church of Scientology), and others, for tax years 1979-1983. In July of 1984, Los Angeles newspapers reported that former Church of Scientology officials had testified in a state court action in California that millions of dollars had been transferred to Hubbard in the late 1970's and early 1980's from various Scientology entities. See *Church of Scientology* v. *Armstrong*, No. C 420 153 (Cal. Super. Ct.). As part of its investigation, the IRS served an administrative summons on the Clerk of the Los Angeles County Superior Court seeking certain material contained in the record of the *Armstrong* case.[2] The Clerk's Office, however, refused to produce 13 documents that had been ordered sealed by the Superior Court, including the five exhibits at issue here (Exhs. 5-O, 5-P, 6-O, 5-K, 5-L) and another exhibit (Exh. 5-C) at issue in a related case. See *Church of Scientology* v. *United States*, cert. granted, No. 91-946 (Mar. 2, 1992).

The IRS then brought this proceeding in federal district court to enforce its administrative summons. See *United States* v. *Zolin*, 491 U.S. 554, 557-558 (1989). Peti-

[2] The Internal Revenue Service is authorized to issue summonses to obtain production of "any books, papers, records, or other data" that "may be relevant" in "determining the liability of any person for any internal revenue tax" (26 U.S.C. 7602(a)(1)). The district courts have jurisdiction to enforce compliance with these administrative summonses. 26 U.S.C. 7402(b), 7604(a).

tioner and Mary Sue Hubbard intervened to oppose production of the sealed documents. In particular, petitioner argued that Exhibits 5-O, 5-P, and 6-O were not relevant to the tax investigation and that Exhibits 5-K and 5-L were subject to certain privileges, including the attorney-client privilege. Petitioner also argued that sealed Exhibit 5-C, which contains tape recordings of two meetings between various attorneys and representatives of L. Ron Hubbard and the Church of Scientology (known as the MCCS tapes) was protected by the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 557-558.

After oral argument and an evidentiary hearing, the district court ruled that the five exhibits at issue—Exhibits 5-K through 6-O—were relevant to the tax investigation and that any privileges had been waived (Pet. App. 19a). The court ordered these five documents to be produced, but prohibited the IRS from disclosing them to another governmental agency, except in connection with a criminal tax prosecution or with the court's prior approval (*id.* at 19a-20a).[3] The district court also ruled that Exhibit 5-C, the MCCS tapes, contained confidential attorney-client communications, that the privilege had not been waived, and that the crime-fraud exception to the attorney-client privilege did not apply (*id.* at 19a; 491 U.S. at 559). Finally, the district court stayed enforcement of its ruling "for sixty (60) days, and thereafter if an appeal or application for a writ is filed and until decision on appeal or writ application is rendered" (Pet. App. 20a). Both petitioner and the government appealed.

[3] The court of appeals (Pet. App. 11a-12a) subsequently upheld this restriction on the disclosure of the summoned documents to other governmental agencies and this Court affirmed its judgment on that issue by an equally divided Court (*Zolin*, 491 U.S. at 561). That aspect of the district court's order is not now before the Court.

2. The court of appeals affirmed the district court's enforcement order. *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987).[4] The court of appeals ruled that the district court did not err in determining that Exhibits 5-O, 5-P and 6-O were relevant to the tax investigation and that all privileges potentially applicable to Exhibits 5-K and 5-L had been waived (Pet. App. 6a-10a). Finally, with respect to the MCCS tapes, the court of appeals affirmed the district court's rulings, including its ruling that the crime-fraud exception to the attorney-client privilege was not applicable to that document (*id.* at 13a-17a).

3. Petitioner sought no further review of the judgment affirming the order enforcing the summons as to the five exhibits at issue here. The government, however, did file a certiorari petition and review was granted by this Court. In its opinion entered on June 21, 1989, this Court held that the allegedly privileged materials reflected on the MCCS tapes may be reviewed *in camera* to determine whether they fall within the crime-fraud exception to the attorney-client privilege. *United States* v. *Zolin*, 491 U.S. at 562-575. See also note 3, *supra*. The Court concluded that such *in camera* review is proper when the requesting party has presented relevant, nonprivileged evidence that establishes "a reasonable belief that *in camera* review may yield evidence that establishes" the applicability of the crime-fraud exception. 491 U.S. at 574-575.

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[4] On January 24, 1986, during the pendency of the appeal, L. Ron Hubbard died. The court of appeals in *Zolin*, however, rejected petitioner's suggestion of mootness because the investigation entailed civil elements which survived Mr. Hubbard's death. See 809 F.2d at 1414 (adopting the reasoning stated in *United States* v. *Author Services, Inc.*, 804 F.2d 1520, 1522 n.1 (9th Cir. 1986)) (Pet. App. 6a). See also *United States* v. *Zolin*, 491 U.S. at 557 n.3 ("We are satisfied that a live controversy remains.").

On remand, the court of appeals examined the partial transcripts of the MCCS tapes, together with other independent evidence, and concluded that there was sufficient evidence of intended illegality to establish that the tapes were within the scope of the crime-fraud exception. *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990). The court of appeals denied petitioner's petition for rehearing on September 19, 1990, and this Court denied petitioner's certiorari petition on March 18, 1991. *Church of Scientology* v. *United States*, 111 S. Ct. 1309.

Following the denial of petitioner's certiorari petition and receipt of the court of appeals' mandate, the district court entered an order on April 15, 1991, requiring that the MCCS tapes be delivered to the IRS. The district court, the court of appeals and this Court subsequently denied requests for stays pending appeal by petitioner. Copies of the MCCS tapes were then released to the IRS. On September 10, 1991, the court of appeals dismissed petitioner's appeal as moot. This Court granted petitioner's certiorari petition on March 2, 1992. *Church of Scientology* v. *United States*, No. 91-946.

4. In the meantime, on June 19, 1991, the government moved the California Superior Court for an order allowing the government to examine and copy the remaining five exhibits ordered to be released by the district court's enforcement order of April 30, 1985. On July 25, 1991, petitioner filed a motion in the district court to vacate that portion of the district court's enforcement order which had granted the government access to these five exhibits.[5]

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[5] In that motion, petitioner argued that the government had no need for the documents because it had waited for four years before attempting to obtain them. The government noted that petitioner's argument was simply an attempt to relitigate the arguments that had been specifically rejected by the court of appeals and this Court (see *Zolin*, 809 F.2d at 1414; 491 U.S. at 557 n.3).

On September 4, 1991, the district court denied petitioner's motion to vacate the order of production with respect to Exhibits 5-K through 6-O (Pet. App. 2a-3a). The district court noted that it had stayed its production order until the mandate of the court of appeals was received. Since the mandate was not received until January of 1991, the court accordingly concluded that there "has not been the eons of delay postulated" by petitioner (*id.* at 3a). The court also noted there was no "equitable" or "other reason justifying relief" under Rule 60(b) (Pet. App. 3a). Petitioner filed a notice of appeal on September 9, 1991.

On September 19, 1991, the court of appeals denied petitioner's motion for a stay pending appeal. The five exhibits were then released to United States Attorney for copying, and those copies were delivered to the Internal Revenue Service for its review. On January 31, 1992, the court of appeals granted the government's motion to dismiss petitioner's appeal as moot (Pet. App. 1a).

DISCUSSION

In our view, the court of appeals' decision is correct. Since the five exhibits requested by the IRS summons have been produced, petitioner's continued opposition to enforcement of the summons is moot. The "case" or "controversy" that is required to support the exercise of jurisdiction by an Article III court "must concern the subject matter of the action" over which the court has subject matter jurisdiction. *United States* v. *Kis*, 658 F.2d 526, 533 (7th Cir. 1981), cert. denied, 455 U.S. 1018 (1982). The subject matter of a summons enforcement action, and the subject matter jurisdiction of the federal courts under 26 U.S.C. 7402(b), 7604(a), is limited to determining whether "to compel * * * production" of the requested information. Once, as in this case, production has occurred, the only issue for which subject matter ju-

risdiction exists under the statute—whether production should be compelled—has become moot. Because that was the only issue the federal courts had jurisdiction to determine in the summons enforcement proceeding, any further opinion that the courts might render in this proceeding would be advisory in nature. The court of appeals therefore properly dismissed the appeal as moot.

Nevertheless, the issue raised by petitioner in the instant petition is identical to the issue raised by petitioner in *Church of Scientology* v. *United States*, cert. granted, No. 91-946 (Mar. 2, 1992). Consideration of this petition should therefore be deferred pending this Court's decision in No. 91-946.[6]

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[6] As in No. 91-946, this case comes before the Court in an unusual procedural context. The question that petitioner seeks to litigate here—whether the five exhibits requested by the IRS summons should be produced—has been fully adjudicated and finally decided adversely to petitioner. See *United States* v. *Zolin*, 905 F.2d 1344 (9th Cir. 1990), cert. denied, 111 S. Ct. 1309 (1991); *United States* v. *Zolin*, 809 F.2d 1411 (9th Cir. 1987) (Pet. App. 6a-10a). To implement that final judgment, the United States applied to the district court for an order directing production of the requested documents. The district court issued the requested order, rejecting petitioner's attempt at "continued relitigation seemingly continuing forever" (Pet. App. 3a). Petitioner nonetheless appealed the order entered by the district court, again seeking to relitigate the merits of the judgment entered by the court of appeals with respect to production of the five documents at issue. Since that judgment has long been final, this case may properly be disposed of upon this independent ground.

CONCLUSION

The petition for a writ of certiorari should be held pending the decision in No. 91-946 and disposed of as appropriate in light of this Court's disposition of No. 91-946.

Respectfully submitted.

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